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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM JOHNSON, JR.
for the use of ERNEST T. ROSSIELLO, Attorney,

Petitioner,

vs.

ALLSTATE INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The stevedore has not filed any brief in opposition to the petition for a writ of certiorari. The co-respondent longshoreman, now separately represented in this petition, as he was in the court of appeals, has not cited a single case or authority to justify or support the anomalous and irreconcilable decision of a panel of the Seventh Circuit which affirmed a district judge's calculation of the plaintiff-longshoreman's contingent fee after first ordering the stevedore reimbursed in full for

the compensation payments it was obliged to make under a decision and order of the United States Department of Labor,* despite the fact that the stevedore contributed nothing to the third party settlement, and, in fact, resisted it and the compensation proceedings.

If certiorari is granted, the Supreme Court will hear this case on its merits and reversal of the decision below is inevitable, as it is in flagrant conflict with the rules of law in *Bloomer v. Liberty Mutual* decided by the Supreme Court last term, and irreconcilably in conflict with the holdings of the leading cases in this area of longshoremen's plaintiff's lawyer's fees. *Valentino v. Rickners Rhederi, G.m.B.H.*, 552 F.2d 466 (2d Cir. 1977), *Fontana v. Pennsylvania R. Co., etc.*, 106 F.Supp. 461, *aff'd*, 205 F.2d 151 (2d Cir. 1952), *cert. denied*, 346 U.S. 886 (1953), *Chouest v. A & P Boat Rentals, Inc.*, 472 F.2d 1026 (5th Cir. 1973), *cert. denied*, 412 U.S. 949 (1973), *Strachan Shipping Company v. Melvin*, 327 F.2d 83 (5th Cir. 1964).

Here, we have a case which will affect all longshoremen's plaintiff's lawyers who settle third party claims for an amount less than sufficient to pay both the lien of the attorney and that of the stevedore in full."**

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* Nowhere in the LHWCA does the word "lien" appear. Rather, the courts have implied one, as the LHWCA speaks of the employer's equitable "right to reimbursement". See *Bloomer v. Liberty Mutual*, 100 S.Ct. (1980), fn.6.

** Mr. Justice Blackmun appears curious to see how the court will treat this issue when, as here, there is not enough to pay both the attorney's fees and the compensation "lien" in full and chided that disgorgement of compensation payments would not be inconsistent with the ruling in *Bloomer*, which prevented the longshoreman from recouping part of his expenses of litigation from which the stevedore benefitted. [See Pet., also, pp. 8-9].

This is the final lacuna to be filled in questions over distribution of settlements and verdicts in longshoremen's cases when the action is brought by the longshoreman himself under §933(a) of the LHWCA. The case should be heard on its merits because the panel of the Seventh Circuit rendered a decision which dehors the clear ruling of the Supreme Court that "There is no reason to believe that Congress intended a different distribution of the expenses of suit merely because the longshoreman has brought the action." *Bloomer*, 48 L.W. at 4212 (Docket No. 78-1418, Mar. 3, 1980), and dehors the entire body of case law in this area which provides that the expense of creating the settlement is, as in equity it should be, a first charge on the fund itself.

The consequences of allowing the decision below to stand would be to reward the stevedore for resisting the compensation claim and to unjustly enrich it [Mr. Justice Blackmun said in his dissent in *Bloomer*, "the stevedore has everything to gain and nothing to lose. The longshoreman [and his lawyer] takes the risk and the worry of the litigation and, if he gains enough, the stevedore is home free."] In the case at bar, the judges below ostensibly relied on *Bloomer*, but each of them based his ruling on the false premise that the stevedore is entitled to be reimbursed *first* before calculation of the plaintiff's lawyer's fee, and that the first $40,438.50 of the settlement "inured to the stevedore."*

The issue here is special and important to thousands of future longshoremen and their lawyers who take their

* Contrary to the Seventh Circuit's belief, the third party action against the vessel is not assigned to the stevedore, unless the longshoreman fails to bring his own action within six months after a compensation award. See 33 U.S.C. § 933(b).

cases on contingent fee agreements. In *Bloomer*, certiorari was granted to resolve the recurring question whether the stevedore was required equitably to reduce its lien to contribute towards the longshoreman's attorney's fees and expenses of suit, or whether the longshoreman, when he brought the action himself under §933(a), was obligated to pay his own expenses of suit, including attorney's fees. In *Bloomer*, the settlement was large enough to have a remainder wherefrom the longshoreman would recoup something from the third party action. Here, the settlement is not large enough.

This case is different from *Bloomer*, and very like *Valentino* and *Strachan Shipping Company, supra*, for, if we follow the arithmetic ranking of liens, and strictly adhere to the formula for distribution in §933(e) of the LHWCA then Johnson will receive nothing from the $64,000 settlement, as will all the other longshoremen whose cases are not settled for or result in verdicts sufficiently large to pay their agreed lawyer's contingent fees *and* the stevedore for all its compensation payments.

Valentino was such a case. The verdict was $5,000.00 and the stevedore had paid $15,488.31 in compensation. The stevedore intervened to capture the entire $5,000.00 and claimed the longshoreman's lawyer was entitled to no fee because no benefit was conferred on the client. The Second Circuit affirmed the district court's ruling ordering the lawyer paid his 40% contingent fee first, plus his costs, and the remainder to the stevedore's insurance carrier. The plaintiff derived nothing from the third party action.

Strachan Shipping Company v. Melvin is another case very similar to this one. The longshoreman brought his

own action under §933(a), which resulted in a verdict of $30,000.00. The stevedore intervened in the action to recover its $27,836.92 in compensation payments first before calculation of the lawyer's fee. The district judge ordered the lawyer's 40% contingent fee paid first on the entire verdict, plus expenses, then ordered the balance paid to the stevedore's insurance carrier. Again, the longshoreman received nothing from the third party action. The Fifth Circuit affirmed on equitable grounds, citing *Voris v. Gulf-Tide Stevedores*, 211 F.2d 549 (5th Cir. 1954).

Mr. Justice Marshall, speaking for the majority of the Supreme Court, noted that Liberty Mutual Insurance Company did not take issue with the proposition that the expenses of suit are a first charge on the settlement. [*Bloomer*, fn. 13].* However, the judges in both the northern district of Illinois and the Seventh Circuit apparently did. Mr. Justice Marshall explicitly in *Bloomer* [fn. 13] stated that the *Valentino* situation was not being addressed on March 3, 1980. However, this is the precise case for the Supreme Court to decide finally whether the fees and expenses of suit in a longshoreman's action under §933(a) are, as in equity they should be, a first charge on the settlement itself. And whether the words of Judge Weinfeld of the Southern District of New York should be memorialized by the Supreme Court:

> *Thus, the Act treats the recovery as a fund charged first with the expense of the litigation and then with the amounts paid for compensation and medical expenses* and the employee becomes entitled only to any excess finally remaining. There is no reason why a recovery obtained against the third party by

* Footnotes 6 and 13 in *Bloomer* were also called to the attention of the panel of the Seventh Circuit during oral argument.

> the employee rather than the employer should be distributed differently. *The expense of securing the recovery is, as in equity it should be, a first charge against the fund itself.* As such it is immaterial whether the fund was created in a suit brought by the employer or one brought by the employee.

See *Fontana, supra,* 106 F.Supp. at 463-4.

Unless the Supreme Court decides this final issue over attorney's fees under §933(a) this problem is likely to recur and will not be resolved. Almost every court which has been asked to decide the issue of priority of attorney's fee over compensation reimbursement has held the lawyer's fee a first charge on the settlement or judgment. The panel of the Seventh Circuit has rendered a decision predicated upon an erroneous interpretation of *Bloomer* as pronounced by the district court [see Petition, p. 7 and App. to Petition, p. 15a]. This is a most significant issue of federal law.

Finally, the position here sought, namely that the longshoreman derive nothing out of the third party action, is not one which is gladly embraced by petitioner. Petitioner represented Johnson in the trial court. He represents many longshoremen, and he is familiar with the maritime law in this area. The rule in *Swift v. Bolten* has been disapproved by the Supreme Court, therefore, the burden of the expense of creating a third party settlement rests entirely on the longshoreman. While petitioner takes no issue with this ruling, he urges the Supreme Court to decide the issue here whether a stevedore who did not intervene in the third party action until after the case was settled and dismissed, and who contributed nothing by way of services, effort, finances, resources or cooperation should, in law and equity, be entitled to disrupt the settlement fund and recover full reimbursement for compensation payments made under

the LHWCA before the plaintiff's lawyer takes his agreed contingent fee from the settlement under §933(a) which gives the longshoreman the right to bring his own private action, including choice of counsel. *Valentino v. Rickners Rhederi, G.m.B.H.*, 552 F.2d at 469 (2d Cir. 1977).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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